

Case No. S147999

IN THE
Supreme Court of the State of California

In re MARRIAGE CASES
Judicial Council Coordination Proceeding No. 4365
Court of Appeal No. A110651

PROPOSITION 22 LEGAL DEFENSE AND EDUCATION FUND,
Plaintiff and Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO, et al.,
Defendants and Respondents,

DEL MARTIN, et al.,
Intervenors/Defendants/Respondents.

**SUPREME COURT
FILED**

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After a Decision by the Court of Appeal,
First Appellate District, Division Three,
Consolidated on Appeal with Case Nos.
A110449, A110450, A110451 A110463, A110652
San Francisco Superior Court Case Nos. 503943, 428794
Honorable Richard A. Kramer, Judge

Frederick K. O'Hirich Clerk

DEPUTY

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EDUCATION FUND OPENING BRIEF**

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CERTIFICATION OF INTERESTED ENTITIES OR PERSONS

MARRIAGE CASES, IN RE (S147999)

<u>Full Name of Interested Entity/Person</u>	<u>Party / Non-Party</u>		<u>Nature of Interest</u>
Proposition 22 Legal Defense and Education Fund	<input checked="" type="checkbox"/>	<input type="checkbox"/>	The outcome of this proceeding could substantially affect the investment of time, money, and personal reputations by the proponents, sponsors, and organizers of the campaign to enact Proposition 22 into law, which the party represents.
	<input type="checkbox"/>	<input type="checkbox"/>	
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Submitted by: ANDREW P. PUGNO, Alliance Defense Fund

Andrew P. Pugno 1/4/2007

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ISSUES PRESENTED

1. Whether claims under Code of Civil Procedure § 526a and § 1060 may be rendered moot by a writ of mandate that restrains conduct without reaching the merits of the claims for injunctive and declaratory relief.

2. Whether citizen initiative proponents and organizers have a unique interest in defending the constitutionality of an initiative in which they have invested time, money and reputation.

3. Whether a trial judge's finding of justiciability under CCP § 1060 in complex litigation is entitled to a deferential standard of review.

4. Whether California Family Code § 308.5 applies to marriages contracted within California.

INTRODUCTION

When a local government challenges the constitutionality of a state law by choosing to violate it, the controversy over the validity of the conduct necessarily includes the issue of whether the law is constitutional. That does not mean that the local government can *compel* a court to rule on the constitutionality of the law or laws at issue prior to determining the validity of the conduct. But it does mean that the constitutionality of the law or laws is placed in controversy by the conduct. A court certainly has discretion to address the constitutionality of the underlying laws in a lawsuit challenging the validity of the governmental action, either before or after ruling on the validity of the conduct.

The City and County of San Francisco ("City") created at least two controversies when it began issuing marriage licenses to same-sex couples: a controversy over whether it had the authority to act upon its belief that the marriage laws are unconstitutional, and a controversy over whether the laws are, in fact, unconstitutional. The City created a third controversy by taking

the position that California Family Code § 308.5 (“Proposition 22”) does not apply to marriages contracted within California.

This Court resolved the first controversy in *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055 [17 Cal.Rptr.3d 225], but it deliberately chose not to address the second one. (*Id.* at p. 1112.) The trial court exercised its discretion in choosing to resolve the second controversy in this case. It properly recognized that the resolution of the first controversy did not moot Proposition 22 Legal Defense and Education Fund’s (the “Fund”) right to have the second controversy resolved. It properly recognized that governmental conduct challenging the constitutionality of a law involves more than the bare question of whether the government may continue violating the law. Thus, it treated the writ of mandate issued in *Lockyer* as interim relief in this case.

Neither the Superior Court nor the Court of Appeal issued a ruling on the scope of Proposition 22. But the scope of Proposition 22 – i.e., whether it applies to marriages in California – is crucial to the resolution of the arguments attacking the constitutionality of the marriage laws. If Proposition 22, a voter-passed initiative, limits marriage in California to the union of a man and a woman, then no laws or policies subsequently enacted by the Legislature alone may be relied upon to argue that Proposition 22’s limit on marriage is unconstitutional. (Cal. Const., Art. 2, Sec. 10(c).) Thus, it is imperative that this Court determine the scope of Proposition 22 in this litigation. Because the State has not defended the scope of Proposition 22, the Fund is unquestionably the party with the greatest interest in doing so. If the scope of Proposition 22 is not determined in this litigation, additional litigation may be required.

This case did not arise out of an abstract desire of the Fund to determine whether Proposition 22 is constitutional. Nor did it arise out of a desire by the

Fund to participate in litigation between the City and the State. Instead, it arose as a result of the controversies the City created by issuing marriage licenses to same-sex couples beginning February 12, 2004. (*See id.* at p. 1071.) Two of the controversies created by that illegal activity were not resolved in *Lockyer*.

BACKGROUND

On February 13, 2004, the Fund filed this suit seeking a writ of mandate under CCP § 1085, and declaratory and injunctive relief under CCP §§ 526a and 1060. (*See Lockyer, supra*, 33 Cal.4th at p. 1071; Clerk’s Transcript (“CT”), 813, 1023.) The public right to have the laws executed and public duties enforced supported standing under CCP § 1085; the illegal expenditures relating to the issuing of invalid marriage licenses supported standing under CCP § 526a; and the City’s challenge to the constitutionality and scope of Proposition 22 supported standing under CCP § 1060. The City did not (and does not) dispute that there was a live controversy when the case was filed. (Recorder’s Transcript (“RT”), 110, 112.)

All of the parties initially agreed that the Fund could not obtain all of the relief it was seeking without a determination of the constitutionality of the marriage laws. (CT:160.) The City defended the lawsuit by arguing that the marriage laws were unconstitutional, and that Proposition 22 does not apply to California marriages. (CT:159-160; CT: 1055-1061.) On February 19, 2004, the City turned its affirmative defenses into claims by filing a cross-complaint against the Fund and the State of California to seek a declaratory judgment that Proposition 22 does not apply to California marriages, and that the other marriage laws are unconstitutional. (CT:1055-1061.)

On February 17, 2004, the trial court ruled that an alternative writ of mandate would issue against the City, but denied an immediate stay. (*See*

Lockyer, supra, 33 Cal.4th at p. 1071, n.6; CT:1107.) On February 25, 2004, Barbara Lewis, et al. filed an original action in this Court seeking an immediate stay and a peremptory writ against county clerk Nancy Alfaro. Two days later the Attorney General sought a similar writ against the City and County of San Francisco. The cases were consolidated, with *Lockyer* as the lead case. (*Id.* at p. 1072-1073.) On March 11, 2004, the Court issued an immediate stay of the issuing of marriage licenses to same-sex couples. (*Id.* at p. 1073.) In the same order it stayed the proceedings in this case and the case with which it was consolidated, *Thomasson v. Newsom*, San Francisco Superior Court case number CGC-04-428794, pending the outcome of the Supreme Court proceedings. (*Ibid.*) The Court expressly stated that the stay did not prohibit the filing of lawsuits challenging the constitutionality of the marriage statutes. (*Id.* at p. 1073-1074.)

Four additional lawsuits challenging the marriage laws were filed shortly after the March 11, 2004 order. One of the lawsuits was a new lawsuit by the City against the State, which raised the same claims as the cross-complaint filed against the Fund and the State on February 19, 2004.¹ All six of the lawsuits were subsequently coordinated in Judicial Council Coordination Proceeding No. 4365, with Judge Richard A. Kramer as the coordination judge.

This Court issued its decision in *Lockyer*, on August 12, 2004. It held that San Francisco officials exceeded their authority in issuing marriage licenses to same-sex couples, and ruled that the licenses were void *ab initio*. (*Lockyer, supra*, 33 Cal.4th at p. 1069, 1113.) The decision dissolved the stay of the *Fund* and *Thomasson* cases. (See Supreme Court Minute Order of

¹The City dismissed the cross-complaint on June 4, 2004. (CT:1162.)

September 15, 2004 (*Lockyer*, Supreme Court Case No. S122923.) The writ of mandate restraining the City’s illegal conduct did not address the merits of the controversies over the scope and constitutionality of Proposition 22. (*See Lockyer, supra*, 33 Cal.4th at p. 1102 [“we have no occasion in this case to determine the constitutionality of the current California marriage statutes”].)

Upon the lifting of the stay, the Fund filed a motion to discharge its alternative writ, with costs, on the ground that as a result of the *Lockyer* ruling, it had obtained the mandamus relief it sought. (CT:155, 159.) The Fund also sought permission to file a Second Amended Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief. (CT:155-164.) The proposed complaint clarified that the claims for declaratory relief under CCP §§ 526a and 1060 included a request for a judgment that the marriage laws, including Proposition 22, are constitutional, and added allegations about the interests represented by the Fund. (CT:159-162.) The Fund argued, in reliance upon the verified complaint, that it “represents the interests of the proponents and campaign organizers of Proposition 22, who had direct involvement in the initiative’s enactment and now have a direct interest in the continued validity of Proposition 22” (CT:164.) In that motion the Fund also reiterated its arguments about its standing under CCP § 526a to challenge the City’s illegal expenditures in regard to issuing marriage licenses to same-sex couples. (CT:162.) It further pointed out that its request for a permanent injunction, authorized under § 526a by the City’s illegal expenditures, was not mooted by *Lockyer* – the writ of mandate in that case acted only as interim relief in the Fund’s case because the constitutionality of the marriage laws was still at issue. (CT:163-164.)

At the hearing on the motions to discharge, for costs, and to amend, the court also considered a motion by the City to dismiss for mootness, which

encompassed a claim that the Fund no longer had standing. (*Cf.* RT:341 [“I believe . . . that inexorably in ruling that there remained a cause of action or a claim for declaratory relief [on the motion to dismiss], that I considered [standing]”).) The trial court ruled that because the case was not yet finished – the Fund had not yet prevailed on all of its claims – the motion to discharge the alternative writ and for costs was premature. (RT:126; CT:344.) It denied the motion to amend because it construed the existing complaint as broad enough to include a request for declaratory judgment on the constitutionality of the marriage laws. (RT:121; CT:344.) And it denied the City’s motion to dismiss because it found that a live controversy remained. (RT:118; CT:344.)²

All parties filed dispositive motions on the merits in the trial court. The Fund moved for summary judgment declaring that the marriage laws are constitutional. (CT:377.) During the hearing on dispositive motions, the City made an oral motion to dismiss the Fund’s claims for lack of standing, which the court denied for being untimely. (RT:398.) The court further noted, however, that the motion did not have merit “because of the remaining question regarding the permanency of an order against Mayor Newsom.” (RT: 399.)

On April 13, 2005, the Superior Court entered a single Final Decision on Applications for Writ of Mandate, Motions for Summary Judgment, and Motions for Judgment on the Pleadings for all six of the coordinated cases, and ordered entry of separate judgments for each case. (CT:703-728.) The Final Decision found California’s marriage laws, including Proposition 22,

²The judge stated that he believed he had the discretion to reconsider the denial of intervention in the City’s case against the State, but that there was no need to do so – apparently because the Fund had viable claims in this case against the City. (RT:117.)

unconstitutional on a number of grounds under the California Constitution's equal protection provision. (CT:705, 718, 725.) The trial court denied the Fund's motion for summary judgment and granted the City's motion for judgment on the pleadings. (CT:726-727.) Although the court observed that "the background materials to Proposition 22 indicate that its purpose as articulated to the voters was to preclude the recognition in California of same-sex marriages consummated outside of this state," (CT:713), it did not rule on whether Proposition 22 applies to same-sex "marriages" contracted within the state. In fact, the court went on to find Proposition 22 unconstitutional (CT:727), a finding it could not have made in the Fund's case if Proposition 22 did not apply in California.

The Court of Appeal reversed on October 5, 2006. Nevertheless, the Court affirmed the separate final judgment against the Fund on the ground that the Fund's claims were not justiciable. (*In re Marriage Cases* (2006) 49 Cal.Rptr.3d 675, 689, 727 [unpublished].) It concluded that it did not need to determine the scope of Proposition 22 in addressing the challenges to the constitutionality of the marriage laws. (*Id.* at p. 693.) This Court granted review on December 20, 2006.

ARGUMENT

I. A WRIT OF MANDATE RESTRAINING CONDUCT DOES NOT MOOT CLAIMS INVOLVING THE CONSTITUTIONALITY OF THE STATUTES CHALLENGED BY THE CONDUCT.

The Court of Appeal decision below implies that if a court grants a petition for writ of mandate to restrain unlawful governmental conduct, the issuance of the writ ends the entire controversy; it eliminates the standing of the plaintiff that filed the lawsuit to obtain a declaratory judgment on the controversy over the constitutionality of the laws at issue. The question of

whether there is standing to resolve the entire controversy raised by illegal governmental activity under California Code of Civil Procedure section 526a (taxpayer standing) or section 1060 (declaratory judgment) has not been directly addressed by this Court. Nevertheless, existing precedent suggests that there is standing to resolve all of the controversies.

A. The *Lockyer* Writ of Mandate Did Not Affect Standing to Determine Whether the Marriage Laws Are Constitutional.

If the trial court had issued an alternative writ and interim stay on February 17, 2004, no one would have questioned that the Fund had standing to prosecute its suit until it had a determination of whether Proposition 22 applies to California marriages, and whether it is constitutional. Indeed, the City initially defended by arguing that a stay or other relief preventing the issuing of marriage licenses could not be granted without addressing the constitutional claims. As this Court noted in *Lockyer*, the City's authority to provide marriage licenses to same sex couples and the constitutionality of the marriage laws are two different issues. (*Lockyer, supra*, 33 Cal.4th at p. 1112.) Thus, the fact that this Court granted a peremptory writ addressing the issuing of marriage licenses did not affect the other controversies involving the constitutionality of the marriage laws and the scope of Proposition 22.

From the Fund's perspective, it makes no difference whether the City ceased issuing marriage licenses (and making illegal expenditures) voluntarily, as the result of a preliminary injunction or stay in the Fund's case, or as the result of a writ of mandate in another case. In all of those scenarios, the Fund's original standing to resolve the separate controversies over the scope and constitutionality of Proposition 22 is unaffected.

1. Taxpayer standing, Section 526a.

A taxpayer action under CCP § 526a is available to restrain or prevent the illegal expenditure of public funds. This Court has “ma[d]e clear that under section 526a ‘no showing of special damage to the particular taxpayer [is] necessary.’” (*White v. Davis* (1975) 13 Cal.3d 757, 764 [120 Cal.Rptr. 94].) The purpose of the taxpayer statute is to allow a large class of citizens to challenge the illegal use of public funds. (*Ibid.*) Section 526a provides standing for declaratory relief as well as injunctive relief:

While [the] language [of § 526a] clearly encompasses a suit for injunctive relief, taxpayer suits have not been limited to actions for injunctions. Rather, in furtherance of the policy of liberally construing section 526a to foster its remedial purpose, our courts have permitted taxpayer suits for declaratory relief, damages and mandamus. To achieve the “socially therapeutic purpose” of section 526a, “provision must be made for a broad basis of relief. Otherwise, the perpetration of public wrongs would continue almost unhampered.”

(*Van Atta, Jr. v. Scott* (1980) 27 Cal.3d 424, 449-450 [166 Cal.Rptr. 149] [footnotes and citation omitted].)

The Fund’s claim under section 526a is that the City’s issuing of marriage licenses in violation of Proposition 22 involved an illegal expenditure of funds that should be permanently enjoined and declared invalid. This Court’s decision in *Lockyer* is a definitive ruling that the expenditures were invalid and that the City could not continue issuing marriage licenses to same-sex couples. However, the Fund’s section 526a claim has not been resolved because of the ongoing dispute with the City over the scope and constitutionality of Proposition 22.³ The Fund has not obtained a ruling that

³The City’s February 19, 2004, cross-complaint against the Fund is an admission that the City believed there was a live controversy between the City

the City violated Proposition 22, or that Proposition 22 is constitutional. Thus, the writ of mandate in *Lockyer* did not affect the Fund’s declaratory judgment claims under section 526a.

The Court of Appeal ruled that the Fund did not have standing because it had not “identified any continuing public expenditure it challenges.” (*Marriage Cases, supra*, 49 Cal.Rptr.3d at p. 690, App. 16.) However, the authorities the Court cited hold only that the action “must involve an actual or threatened expenditure of public funds.” (*Id.* [citation omitted].) Indeed, this Court has held that if a plaintiff can establish that an unlawful public expenditure has already occurred, it “will be entitled, at least, to a declaratory judgment to that effect” (*Stanson v. Mott* (1976) 17 Cal.3d 206, 223 [130 Cal.Rptr. 697].) An ongoing or future expenditure is relevant only to an injunction. (*Ibid.*; see also *Save the Welwood Murray Memorial Library Committee v. City Council of the City of Palm Springs* (1989) 215 Cal.App.3d 1003, 1017 [263 Cal.Rptr. 896] [citing *Stanson*]; *Hooper v. Deukmejian* (1981) 122 Cal.App.3d 987, 1019 [176 Cal.Rptr. 569] [same]; *Central Valley Chapter of 7th Step Foundation, Inc. v. Younger* (1979) 95 Cal.App.3d 212, 232 [157 Cal.Rptr. 117] [same].) In this case, there was an actual, unlawful expenditure of public funds when the City issued marriage licenses to same-sex couples. However, there has been no adjudication of whether that expenditure violated Proposition 22 – that is a question at issue in determining the scope of Proposition 22. If Proposition 22 applies to California marriages, the City’s conduct in issuing marriage licenses to same-sex couples was an unlawful expenditure in violation thereof.

and the Fund over the constitutionality of the statutes. (CT:1058, ¶¶ 9-10.) The Intervenor-Defendants made a similar admission by filing a cross-complaint against the Fund on March 10, 2004. (CT:1142.)

2. Declaratory Judgment, Section 1060.

“The fundamental basis of declaratory relief is the existence of an actual, present controversy over a proper subject.” (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79 [124 Cal.Rptr.2d 519] [citation and emphasis omitted].) In *City of Cotati* this Court acknowledged that the validity or construction of legislation is an appropriate issue for declaratory relief: “An action for declaratory relief lies when the parties are in fundamental disagreement over the construction of particular legislation, or they dispute whether a public entity has engaged in conduct or established policies in violation of applicable law.” (*Id.* [citation omitted].)

This case involves a fundamental disagreement between the City and the Fund over the construction of Proposition 22, as well as a disagreement over the constitutionality of the initiative. (CT:1058.) The City initially admitted that there is an active controversy between the City and the Fund over these issues. (CT:1058, 1142.) Those controversies are separate from the one over whether the City had the authority to issue marriage licenses to same-sex couples without having first challenged the constitutionality of the marriage laws. The latter controversy over conduct is all that was addressed in *Lockyer*. (*See Lockyer, supra*, 33 Cal.4th at p. 1102.) Accordingly, the *Lockyer* writ of mandate has no bearing on the controversies created by the City’s public challenge to the scope and constitutionality of Proposition 22 by issuing marriage licenses to same-sex couples.⁴

⁴Likewise, the City’s separate lawsuit against the State did not eliminate the controversy. Indeed, preventing the need for subsequent lawsuits like the City’s against the State is the point of a declaratory judgment action. (*Hannula v. Hacienda Homes* (1949) 34 Cal.2d 442, 448 [211 P.2d 302].) The City cannot eliminate a live controversy *that it created* simply by filing a separate lawsuit against the State. Moreover, the City’s lawsuit will not resolve the

The City has suggested that the Fund is relying upon the City's lawsuit against the State as the basis for the controversy in this litigation. That position is not well-grounded. In *City of Cotati* this Court discussed the nature of an actual controversy in the context of an anti-SLAPP motion to strike a complaint. Mobile home park owners had filed a federal lawsuit against the City of Cotati to attack the constitutionality of a city ordinance. The City of Cotati, in turn, filed a state court action in an effort to obtain a more favorable forum. The trial court held that because the two suits arose from the same underlying controversy, the city's state-court suit violated the anti-SLAPP statute. (*City of Cotati, supra*, 29 Cal.4th at p. 80 n.5.) This Court reversed, finding that the controversy existed separately from the mobile home park owners' federal lawsuit. (*Id.* at p. 80.) As the City of Cotati explained, the federal lawsuit put it on notice of the controversy, but was not itself the controversy. (*Id.* at p. 79.)

As in *City of Cotati*, the Fund is not relying upon any of the coordinated lawsuits to establish the controversies. The Fund was put on notice of the controversies by the City's public acts of declaring the marriage laws unconstitutional and issuing marriage licenses to same-sex couples. Those controversies were unaffected by the writ of mandate in *Lockyer*.

Subsequent to the *Lockyer* writ of mandate, and the City's transformation of its affirmative defenses into a separate lawsuit, the City acknowledged the existence of an actual controversy, but took the position that the actual controversy was only with the State, rather than with the Fund. (RT:111-112, 119.) The City's argument was that after *Lockyer*, the trial court

controversy over the scope of Proposition 22 because it has not raised that issue in its claims against the State.

could not grant the Fund any relief. (*Ibid.*) The trial court properly rejected that argument. The granting of a declaratory judgment in the Fund’s action would have the same effect with or without the writ of mandate in *Lockyer* – it would settle the controversy over the scope and constitutionality of Proposition 22 (as well as the constitutionality of the other marriage laws) that the City created by publicly challenging the marriage laws and issuing marriage licenses to same-sex couples.

Accordingly, the Fund has standing both under § 526a because of the City’s illegal expenditures in violation of Proposition 22, and under § 1060 because of the disagreement between the City and the Fund over the scope and constitutionality of Proposition 22.

B. Jurisdiction Over an Action for a Writ of Mandate Properly Encompasses a Declaratory Judgment Regarding the Constitutionality of the Underlying Law.

This Court held in *Lockyer* that it need not decide the constitutionality of the marriage laws in order to determine that the City had exceeded its authority in issuing marriage licenses to same-sex couples. (*Lockyer, supra*, 33 Cal.4th at p. 1112.) However, it did not rule that a claim for writ of mandate relief could *not* include a claim for a declaratory judgment regarding the constitutionality of the underlying statute. It merely ruled that an official violating the law “cannot *compel* a court to rule on the constitutional issue by refusing to apply the statute” (*Id.* at p. 1081 [emphasis by Court].) Indeed, as Justice Moreno explained in concurring, a court entertaining an action for a writ of mandate may properly entertain a claim for a declaratory judgment. (*Id.* at pp. 1121 [Moreno, J., concurring] [“when a court is asked to grant a writ of mandate to enforce a statute over which hangs a substantial cloud of unconstitutionality . . . a court at least has the discretion to refuse to

issue the writ until the underlying constitutional question has been decided”].) If it had not been for the extent of the City’s unlawful activity (i.e., if the City had only issued one marriage license as a test case), the Court may well “have delayed the issuance of a writ of mandate against it until the underlying constitutional question had been adjudicated” (*Id.* at p. 1124.)⁵

Justice Moreno explained that “if a court determines that interim relief to compel a government agency to obey a statute is appropriate, it may grant such relief before the constitutional question is ultimately adjudicated.” (*Id.* at p. 1123.) That, in effect, is what happened in the Fund’s case against the City.⁶ The trial court refused to grant interim relief until it made a determination of the constitutionality of the marriage laws, which was what precipitated the filings in this Court in *Lockyer*. (*See id.* at p. 1071 n.16.) However, this Court thereafter issued a writ of mandate in *Lockyer* “unless and until [the marriage laws] are judicially determined to be unconstitutional”

⁵In fact, if the City had issued only one license as a test case instead of thousands of licenses, there would have been no reason to file petitions for a writ of mandate in this Court. The extraordinary relief granted in *Lockyer* was necessary only because of the City’s flagrant violation of the law.

⁶The City suggests that, contrary to the finding of the trial court, the Fund’s claims did not encompass a claim for declaratory relief on the constitutionality of the marriage laws. (City Answer at p. 5 n.2.) However, even in *Lockyer* counsel for the Fund argued (on behalf of the *Lewis* petitioners) that “[t]he constitutionality of the marriage laws is an issue best left to full development in the lower courts.” (*Lockyer, supra*, 33 Cal.4th at p. 1073 n.7.) The Fund certainly intended to litigate the constitutionality of the laws in its lawsuit against the City, but did not need to make that an overt claim while the City was defending on the basis of the unconstitutionality of the laws. The only reason the Fund did not ultimately amend the complaint to expressly state a claim for declaratory relief on the constitutionality of the marriage laws was the trial court’s finding that the existing complaint encompassed the issue. (RT:121; CT:344.)

(*Id.* at p. 1069.) That mandate, issued while the Fund’s case was pending, but before the constitutionality of the marriage laws was determined, had no more effect on the Fund’s case than an order granting interim relief until the constitutional question is ultimately adjudicated. The scope and constitutionality of Proposition 22, already before the trial court when the petitions for extraordinary relief were filed in *Lockyer*, had not yet been addressed. Thus, two of the controversies created by the City issuing marriage licenses to same-sex couples were still alive. The trial court had the discretion to resolve those live controversies in this case. (*Id.* at p. 1121, 1123 [Moreno, J., concurring] [court may address constitutionality after granting interim relief].)

This case involves illegal governmental conduct undertaken to challenge the constitutionality of laws. The Court of Appeal’s decision revealed confusion over the impact of a writ of mandate in that context. This Court should rule that a plaintiff who has standing to restrain illegal governmental conduct also has standing to litigate the constitutionality of the laws challenged by the conduct. If not, a court has no discretion to decide the constitutionality of a law before deciding whether it should issue a writ of mandate. If so, a plaintiff’s standing to obtain declaratory relief should not be affected when the government’s conduct is so egregious that the Supreme Court must intervene to stop it.

II. THE FUND HAS A UNIQUE INTEREST IN DEFENDING PROPOSITION 22.

A. Initiative Campaign Proponents, Organizers, and Supporters Have the Greatest Interest in Defending the Constitutionality of Their Enactments.

This Court has never directly addressed the issue of whether initiative proponents, or an organization they establish to represent their interests, have

standing to defend attacks on the validity or scope of the initiative.⁷ However, California courts, including this Court, have routinely permitted such persons to defend the constitutionality of the initiatives they have passed. (*See, e.g., Legislature of State of Cal. v. Eu* (1991) 54 Cal.3d 492, 499-500 [286 Cal.Rptr.283] [allowing “the organization that *sponsored* Proposition 140” to intervene in original writ proceeding in Supreme Court] [emphasis added]; *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 812 [258 Cal.Rptr. 161] [“proponents” of Proposition 103 permitted to appear as real parties in interest defending original writ proceeding in Supreme Court]; *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1250 [48 Cal.Rptr.2d 12] [noting that “the organization that drafted Proposition 103 and *campaigned for its passage*” had been permitted to intervene] [emphasis added]; *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 241 [32 Cal.Rptr.2d 807] [noting that “proponent of Proposition 103” had been permitted to intervene].) In fact, the only published California opinion denying intervention to an initiative proponent, sponsor, or campaign organizer is the Court of Appeal’s affirmance of the denial of the Fund’s effort to intervene in the City’s suit against the State – and that was an appeal of a denial of permissive intervention. (*City*

⁷The Fund represents the proponents and organizers of the campaign to enact Proposition 22, as alleged in its proposed Second Amended Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief. (CT:164.) Evidence relating to the specific interests of the Fund and its organizers was not entered into the record because the City chose not to file a motion and have a hearing on standing when Judge Kramer offered the option. (*See* CT:118 [“nobody has asked me to dismiss their complaint for lack of standing, although I’m giving you [a] pretty good idea, if you want to go ahead and make that motion that’s fine, I don’t think, unless you come up with something different I don’t think that that’s going to work, and I think it might involve some pretty substantial fact type questions as to the nature of these plaintiffs and the nature of their interest. I have obviated all of that”].)

and County of San Francisco v. State of California (2005) 128 Cal.App.4th 1030, 1044 [27 Cal.Rptr.3d 722] (“CCSF”).⁸ The decision below is the only California decision denying standing to an initiative proponent, sponsor, or campaign organizer.

The reserved right of citizen initiative is a core value of the California Constitution. (*Associated Home Builders of the East Bay, Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591 [557 P.2d 473].) Initiative proponents, sponsors, and campaign organizers have a unique interest in the validity and scope of an enactment they have successfully promoted. (*See City of Santa Monica v. Stewart* (2nd Dist. 2005) 126 Cal.App.4th 43, 89-90 [24 Cal.Rptr.3d 72] [“As the sponsor and proponent of the embattled Initiative, the intervenors . . . had a “personal interest” in the litigation in the broad sense that they were emotionally and intellectually connected to the litigation in ways that the general public was not”], quoting *Hammond v. Agran* (4th Dist. 2002) 99 Cal.App.4th 115, 125 [120 Cal.Rptr.2d 646].) Initiative proponents, sponsors, and campaign organizers invest time, money, and personal reputation in the effort to pass an initiative. Their interest goes far beyond a mere political interest. (*Ibid.*)⁹ If the proposition for which they labored is struck down, all

⁸While the Fund’s case was stayed it filed a motion to intervene in the City’s case against the State. That motion was denied by the trial court, and the denial was affirmed on appeal. (*City and County of San Francisco v. State of California* (2005) 128 Cal.App.4th 1030 [27 Cal.Rptr.3d 722].)

⁹The Fund is not claiming injury in the sense of impairing or invalidating its members marriages, or “any diminution in legal rights, property rights or freedoms,” which was all the Court of Appeal considered to be an injury. (*Marriage Cases, supra*, 49 Cal.Rptr.3d at p. 689-690 and n.8.) However, the Fund has consistently claimed injury to its members’ interests as proponents, sponsors or organizers of the campaign to enact Proposition 22. (Fund Reply Brief on Appeal at pp. 56-58.)

of their efforts and investments will have been in vain. Presumably, that is why California courts have routinely recognized that proponents, sponsors, and campaign organizers have a right to defend their initiatives.

Indeed, those who work diligently to pass an initiative are likely to be the most vigorous defenders of their enactments. A Ninth Circuit observation about who is most interested in defending a citizen initiative is particularly apropos:

Moreover, as appears to be true in this case, the government may be less than enthusiastic about the enforcement of a measure adopted by ballot initiative; for better or worse, the people generally resort to a ballot initiative precisely because they do not believe that the ordinary processes of representative government are sufficiently sensitive to the popular will with respect to a particular subject. While the people may not always be able to count on their elected representatives to support fully and fairly a provision enacted by ballot initiative, they can invariably depend on its sponsors to do so.

(*Yniguez v. State of Arizona* (9th Cir. 1991) 939 F.2d 727, 733.) That observation is true in the *Marriage Cases* as well. The Attorney General has been unwilling to raise certain defenses in the coordinated proceedings because of his political views. For example, the Attorney General has “expressly disavowed” the responsible procreation rationale for marriage, and “take[n] the position that arguments suggesting families headed by opposite-sex parents are somehow better for children, or more deserving of state recognition, are contrary to California policy.” (*Marriage Cases, supra*, 49 Cal.Rptr. 3d at p. 724 n.33, App. 46.)¹⁰ In contrast, the Fund has vigorously presented the overwhelming weight of authority holding that encouraging

¹⁰The alleged policy upon which the Attorney General relies arises from laws enacted *after* Proposition 22.

responsible procreation and child rearing by biological parents within marriage is the primary state interest justifying the marriage laws. (*See ibid.*) The Attorney General has taken no position whatsoever on the scope of Proposition 22, while the Fund has argued that Proposition 22 applies in California. (CT:581.) Finally, the Attorney General has argued that the California Registered Domestic Partnership Act, Family Code § 297.5, and the case law construing it, is the basis for the public policy he is arguing. The Fund has argued that to the extent Family Code § 297.5 counters the policy embodied in Proposition 22, any such contrary policy may not be relied upon to undermine the constitutionality of Proposition 22 because it was not submitted to the voters for approval. (CT:581 [“§ 308.5 prevents the Legislature from amending California’s statutes concerning the fundamental principles underlying the institution of marriage. (*See Cal. Const., Art. II, Sec. 10(c)*”).]) The Fund’s positions and vigorous defense of Proposition 22 are apparently why the City has worked so hard in its effort to litigate against the State only.¹¹

“The purpose of a standing requirement is to ensure that the courts will decide only actual controversies between parties *with a sufficient interest in the subject matter of the dispute to press their case with vigor.*” (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 439 [261 Cal.Rptr. 574] [emphasis added].) The State obviously has no interest in the scope of Proposition 22 because it has made no effort to defend its application to California marriages. But for the presence of the Fund (and the *Thomasson*

¹¹The City fought strenuously to prevent the Fund from intervening in its lawsuit against the State. (*See CCSF, supra*, 128 Cal.App.4th 1030.) It filed a motion to dismiss for mootness in this case (CT:1358-1371), and also made an oral motion to dismiss for lack of standing during the hearing on the merits. (RT:391.)

parties), there would be no party with an interest in establishing that Proposition 22 applies to California marriages. Thus, the trial court's denials of the City's motion to dismiss for mootness and belated oral motion to dismiss for lack of standing during the hearing on the merits were consistent with the purpose of the standing requirement.

B. The Fund's Associational Standing Gives It a Legally Protected Interest in the Constitutionality of Proposition 22.

There is no group of citizens more closely connected with the drafting, authorship, and passage of Proposition 22 than the organization founded by its proponent, sponsors, and organizers. Denying standing to an organization created to represent the interests of an initiative's proponent, sponsors, and campaign organizers leads to the absurd result that opponents of the initiative can challenge it, but no zealous sponsors can defend it. In public policy litigation involving deeply held views about controversial social issues, advocates on both sides should be permitted to participate as parties. Anything less impugns the integrity of the judicial system.

California courts have repeatedly recognized that under both California and United States Supreme Court precedent, an association has standing to assert claims of its members:

[A] plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. However, even in the absence of injury to itself, an association may have standing solely as the representative of its members. An association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

(Property Owners of Whispering Palms, Inc. v. Newport Pacific, Inc. (2005) 132 Cal.App.4th 666, 672-673 [33 Cal.Rptr.3d 845] [internal citations and quotations omitted]; accord, Apartment Ass’n of Los Angeles County, Inc. v. City of Los Angeles (2006) 136 Cal.App.4th 119, 129 [38 Cal.Rptr.3d 575].)

In fact, “an association has standing to sue when ‘its members, *or any one of them*, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit.’” (*Whispering Palms*, 132 Cal.App.4th at p. 673 [emphasis original].) In *Whispering Palms*, the Court specifically recognized the standing of an association to bring claims for which a significant portion of its members did *not* have standing, since others did. (*Id.* [“Pursuant to these authorities, the fact that the Association’s membership includes residents of Greens No. 1 does not prevent the Association’s standing to bring this action on behalf of residents of Greens Nos. 2 and 3”].)

Principals of the Fund actively participated in the campaign for Proposition 22’s passage.¹² Senator William J. Knight, the official proponent of the initiative, and other campaign sponsors and organizers created the Fund to represent their interests in defending Proposition 22. (*CCSF, supra*, 128 Cal.App.4th at p. 1034-1035.) Senator Knight served as president of the Fund until his untimely death on May 7, 2004. (*Id.* at p. 1038 n.7.) Fund board member Natalie Williams “regularly spoke to individuals and organizations urging support for Proposition 22’ before it was enacted, and she participated

¹²The record on the express nature of the Fund’s interests would be more complete if the City or the Intervenors had accepted the coordination judge’s invitation to file a motion to dismiss the Fund’s complaint on the basis of standing. (Reporter’s Transcript at pp. 105-106). The court anticipated that such a motion would resolve factual issues about standing. (*Id.* at p. 106.)

in designing campaign strategies in support of the initiative.” (*Id.* at p. 1035.) Similarly, Fund board member and secretary Dana Cody “participated in campaign meetings regarding the initiative . . . [and] also headed a separate public interest organization that supported passage of Proposition 22.” (*Ibid.*) Many of the Fund’s financial supporters contributed directly to the campaign to enact Proposition 22. Such persons have routinely been deemed to have a sufficient interest to defend the constitutionality of their enactments. (*See, e.g., Eu, supra*, 54 Cal.3d at 499-500 [allowing “the organization that sponsored Proposition 140” to intervene in original writ proceeding in Supreme Court] [emphasis added]; *Amwest Surety, supra*, 11 Cal.4th at p. 1250 [noting that “the organization that drafted Proposition 103 and campaigned for its passage” had been permitted to intervene] [emphasis added].)¹³

The fact that the chief standard-bearers for the enactment of Proposition 22 formed the Fund after its enactment presents no barrier to the justiciability of the Fund’s declaratory claims. The law allows Proposition 22’s proponents and campaign organizers to rely on the Fund as the vehicle for defending the direct interests of those (like Williams, Cody and others) who were actively

¹³While these cases involved intervention, it appears that California’s intervention standards may be more strict than its standing requirements, since standing is not a constitutional prerequisite, as it is in federal court. (*See, e.g., Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 29 [112 Cal.Rptr.2d 5] [standing in California is more lenient than in the federal courts because “California’s Constitution, unlike its federal counterpart, does not contain a ‘case or controversy’ limitation on the judicial power”]; *see also National Paint & Coatings Assn. v. State of California* (1997) 58 Cal.App.4th 753, 760-762 [68 Cal.Rptr.2d 360] [unlike U. S. Constitution’s Article III, there is no barrier in the California state constitution to recognizing justiciability of suits by citizens in the undifferentiated public interest].

involved in promoting, supporting, and organizing the campaign for the passage of Proposition 22.

III. THE TRIAL COURT’S FINDING OF JUSTICIABILITY UNDER SECTION 1060 SHOULD BE REINSTATED.

The Court of Appeal refused to defer to the Superior Court’s ruling on justiciability. Instead of extending appropriate deference to the trial court, the Court of Appeal undertook a *de novo* review of standing. The gravamen of the Court of Appeal decision on justiciability was that it did not believe the Fund had any interest different from the citizenry at large to pursue declaratory relief after the writ of mandate in *Lockyer*. (*Marriage Cases*, 49 Cal.Rptr.3d at p. 689-690, App. 15-17.) The Court of Appeal relied heavily on its decision in *CCSF*, an intervention case, in its *de novo* review of standing in this case. (*Marriage Cases*, 49 Cal.Rptr.3d at p. 689-690, App. 15-17.) That reliance – and the *de novo* review – was improper because of the difference in the posture of the two appeals. The appeal in *CCSF* was from Judge Warren’s discretionary ruling denying permissive intervention, to which the Court of Appeal owed deference. (*CCSF*, 128 Cal.App.4th at p. 1044.) Likewise, Judge Kramer’s justiciability ruling in this case was discretionary. (RT:341; CT:118, 344.) It too was entitled to deference. (*Hannula v. Hacienda Homes* (1949) 34 Cal.2d 442, 448 [211 P.2d 302].) Similar deference to Judge Kramer’s ruling on justiciability would have resulted in upholding the ruling rather than reversing it.

A. A Finding of Justiciability under Section 1060 Is Entitled to Deference.

It is well established that a trial court has broad discretion to determine whether a justiciable controversy exists to support declaratory relief. (*Hannula, supra*, 34 Cal.2d at p. 448 [“Whether a determination is proper in

an action for declaratory relief is a matter within the trial court’s discretion”]; *see also, Tehachapi-Cummings County Water District v. Armstrong* (1975) 49 Cal.App.3d 992, 998 [122 Cal.Rptr. 918] [“Whether justiciability exists in a jurisdictional sense in a declaratory relief action rests within the sound discretion of the trial court”]; *California Physicians’ Service v. Garrison* (1946) 28 Cal.2d 790, 801[172 P.2d 4] [“Whether a [declaratory judgment] determination is necessary and proper is a matter within the discretion of the trial court “[.]”].) In addition, a finding of justiciability under CCP 1060 supports standing for the plaintiff. (*Application Group, Inc., v. Hunter Group, Inc.* (1998) 61 Cal. App.4th 881, 892 [72 Cal.Rptr.2d 73] [“Code of Civil Procedure section 1060 confers standing . . . to bring an action for declaratory relief in cases of actual controversy relating to the legal rights and duties of the respective parties”].)

Accordingly, this Court has held that a trial court’s decision to issue a declaratory judgment should be sustained absent a showing of abuse of discretion. (*Hannula, supra*, 34 Cal.2d at p. 448 [“the court’s decision to grant or deny relief will not be disturbed on appeal unless it be clearly shown . . . that the discretion was abused”]; *Filarsky v. Superior Court of Los Angeles County* (2002) 28 Cal.4th 419, 433 [49 P.3d 194] [“The trial court’s decision to entertain an action for declaratory relief is reviewable for abuse of discretion”]; *see also, Auberry Union School District v. Rafferty* (1964) 226 Cal.App.2d 599, 602 [38 Cal.Rptr. 223] [“The trial court’s determination whether or not declaratory relief should be granted will not be disturbed on appeal in the absence of a clear showing of abuse of discretion”].)

Appellate review of discretionary decisions is extremely deferential. This Court has emphasized that:

[A] reviewing court, should not disturb the exercise of a trial court's discretion unless it appears that there has been a miscarriage of justice. Thus, in *Loomis v. Loomis*, 181 Cal.App.2d 345, 348-349(4-6), 5 Cal.Rptr. 550, 552(2-4), it was said: "It is fairly deducible from the cases that one of the essential attributes of abuse of discretion is that it must clearly appear to effect injustice. Discretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all of the circumstances before it being considered. The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power."

(*Denham v. Superior Court of Los Angeles County* (1970) 2 Cal.3d 557, 566 [468 P.2d 193].) The City failed to mention its burden on appeal much less carry it. More importantly, the Court of Appeal failed to apply or even mention the deferential abuse-of-discretion standard set out above. Instead, the Court erroneously considered the justiciability issue *de novo*. (*Marriage Cases, supra*, 49 Cal.Rptr.3d at p. 689-690, App. 15-17.)

The Court of Appeal noted that the "City . . . moved to dismiss [the Fund's complaint] as moot, arguing the Supreme Court's decision in *Lockyer* had granted all the relief sought in these cases and the plaintiffs lacked standing to pursue bare claims for declaratory relief." (*Id.* at p. 688, App. 15.) As demonstrated by the Court of Appeal's decision on this issue and the record below, the question of mootness and standing have been commingled into the broad question of justiciability.

During the motion to dismiss the trial court stated, "I don't think that there is a motion to dismiss based on lack of standing, but I'll consider the arguments now, because we get to the same place. But technically the motion to dismiss is for mootness" (RT:100.) The court further commented,

“Would you like to get into the question of standing – what I’ve done is I’ve interpreted [the complaint] broad enough to state a claim for declaratory relief as to whether the marriage statute is constitutional.” (RT:105.)

It is of little import whether the trial court ruled on the issue of justiciability in the context of mootness or standing. What is significant is the trial court’s discretionary finding that the Fund’s complaint continued to state a justiciable controversy, at least in part because the claims had not been litigated to completion. (CT:118, 126; RT:341.) Nevertheless, the Court of Appeal ultimately concluded that the trial court “erred in denying the motion to dismiss because . . . the Fund lacked standing to pursue these pure declaratory relief claims.” (*Marriage Cases, supra*, 49 Cal. Rptr.3d at p. 689, App. 15.)

The pertinent question for this Court is whether the Court of Appeal applied the correct standard of review of the Superior Court’s finding of justiciability; it did not. This Court should clarify the appropriate standard of review in this type of case.

The Fund’s case arises in the context of complex litigation addressing crucial issues of public concern. The coordination of the six cases below reflected the importance of having all of the issues addressed at once. The trial court was in the best position to weigh all of the competing interests at stake and make justiciability decisions accordingly. (*See Fire Insurance Exchange v. Superior Court*, (2004) 116 Cal.App.4th 446, 452 [10 Cal.Rptr.3d 617][“The trial court has broad discretion, however, to fashion suitable methods of practice in order to manage complex litigation”].) In this case, the trial court determined, in its discretion, that the Fund had viable claims for declaratory relief and therefore allowed the Fund’s case to proceed with the

other consolidated cases. The Court of Appeal may not simply substitute its opinion for that of the trial court. (*Denham, supra*, 2 Cal.3d at 566.)

B. The Trial Court Did Not Abuse Its Discretion in Finding a Justiciable Controversy.

There is no abuse of discretion unless the trial court's exercise of discretion exceeds the bounds of reason *and* results in a miscarriage of justice. (*See Denham, supra*, 2 Cal.3d at p. 566.) The trial court's decision to preserve the Fund as a party to this litigation did not result in a "miscarriage of justice." In fact, the City was not prejudiced in the least by the trial court's discretionary decision. Because of the complexity and multiplicity of the coordinated cases, there is no possibility that dismissing the Fund's case would have relieved the City of its burden to demonstrate the unconstitutionality of the marriage laws.

Moreover, the court's exercise of discretion to find that the Fund's claims are justiciable was eminently reasonable. There had been no adjudication of the scope or constitutionality of Proposition 22. And although the City had created controversies over those issues by its illegal conduct, it was not litigating them in its claims against the State. Thus, the City failed to meet its burden of demonstrating an abuse of discretion. (*See ibid.*) The Court of Appeal erred in reversing the discretionary finding of justiciability.

IV. THE SCOPE OF PROPOSITION 22 IS A CONTROVERSY AT ISSUE IN THE MARRIAGE CASES.

The Court of Appeal ruled that it need not reach the question of the scope of Proposition 22. (*Marriage Cases, supra*, 49 Cal.Rptr. at p. 693.) Nevertheless, the scope of Proposition 22 is at issue: if the statute applies only to out-of-state marriages, it has no bearing on this case. On the other hand, if it applies to California marriages, its constitutionality is at issue, and its special status as an initiative statute limits the arguments available to challenge its

constitutionality. Accordingly, the question of the scope of Proposition 22 should be determined before deciding whether it is constitutional.

A. Proposition 22 Places Limits on Marriage Policy.

The scope of Proposition 22 is crucial to this Court's analysis of the constitutional claims in the consolidated appeals. If Proposition 22 applies to California marriages, its status as an initiative statute limits California's public policy regarding marriage. The public policy embodied in Proposition 22 cannot be changed by the Legislature without a vote by the people. (Cal. Const., Art. 2, Sec. 10(c); *Knigh t v. Superior Ct.* (2005) 128 Cal.App.4th 14, 22 [26 Cal.Rptr.3d 687].) Thus, the Legislature's subsequent findings about same-sex parenting in enacting the Registered Domestic Partnership Act, this Court's construction of that Act, and the Legislature's recent efforts to redefine marriage cannot undermine the constitutionality of the marriage laws if Proposition 22 applies to marriages contracted in California.¹⁴ Yet, on appeal the City relied heavily upon these recent events to argue that California public policy renders the marriage laws unconstitutional. It cannot legitimately do so if Proposition 22 applies to marriages contracted in California. (Cal. Const., Art. 2, Sec. 10(c).)

¹⁴The New Jersey Supreme Court's recent decision in *Lewis v. Harris* (2006) 908 A.2d 196 relied heavily on the public policy formed through a combination of legislative enactments and judicial decisions in concluding that the New Jersey Constitution requires that same-sex couples be treated the same as married couples. (*Id.* at 215.) Proposition 22 precludes a similar result here. Regardless, California already grants same-sex couples the status ordered in *Lewis*. (*See id.* at 224; *Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 839 [115 P.3d 1212].)

B. Proposition 22 Applies to California Marriages.

The question of the scope of Proposition 22 has been subject to differing appellate results. Division One of the Second District Court of Appeal held that Proposition 22 determines only which out-of-state marriages will be recognized in California, and does not apply to California marriages. (*Armijo v. Miles* (2005) 127 Cal.App.4th 1405, 1422-24 [26 Cal.Rptr. 3d 623].) In contrast, the Third District Court of Appeal reached the opposite conclusion, and held that Proposition 22 applies to California marriages as well as out-of-state marriages. (*Knight v. Superior Court* (2005) 128 Cal.App.4th 14, 18 [26 Cal.Rptr.3d 687].) In this case, the Court of Appeal chose not to determine whether Proposition 22 applies to marriages contracted in California. (*Marriage Cases, supra*, 49 Cal.Rptr.3d 675, 693 [“We need not resolve this controversy”].)

Ordinary rules of statutory construction lead to the conclusion that Proposition 22 applies to marriages contracted in California.¹⁵ “In interpreting a voter initiative such as Proposition 22, courts apply the same principles governing the construction of a statute.” (*Knight, supra*, 128 Cal.App.4th at p. 23.) The examination begins with the language of the initiative statute, giving the words their usual and ordinary meaning, viewed in the context of the statute as a whole and the overall statutory scheme. (*Ibid.*) If the terms of the statute are unambiguous, the lawmakers (in this case, the voters) are presumed to mean what they said, and the plain meaning of the language governs. (*Ibid.*)¹⁶ A court cannot insert or omit words to conform the meaning

¹⁵Proposition 22 states as follows: “Only marriage between a man and a woman is valid or recognized in California.” (Cal. Fam. Code § 308.5.)

¹⁶If the language is ambiguous, the court may refer to other indicia of the voters’ intent, such as the analyses and arguments in the official ballot

of a statute to an intent that is not expressed. (Code Civ. Proc., § 1858; *Knight, supra*, 128 Cal.App.4th at p. 23.) The court’s role as a judicial body is “to interpret the laws as they are written.” (*San Diego Police Officers Assn. v. City of San Diego Civil Service Com.* (2002) 104 Cal.App.4th 275, 287 [128 Cal.Rptr.2d 248].)

Applying these principles, the Third District Court of Appeal construed the broad and unqualified language of Proposition 22 as limiting *all* marriages in California:

The plain language of Proposition 22 and its initiative statute, section 308.5, reaffirms the definition of marriage in section 300, by stating that only marriage between a man and a woman shall be valid and recognized in California. This limitation ensures that California will not legitimize or recognize same-sex marriages from other jurisdictions, as it otherwise would be required to do pursuant to section 308, and that California will not permit same-sex partners to validly marry within the state.

Without submitting the matter to the voters, the Legislature cannot change this absolute refusal to recognize marriages between persons of the same sex. (Cal. Const., art. II, § 10, subd. (c).)

(*Knight, supra*, 128 Cal.App.4th at pp. 23-24.)

The City has argued, however, that because existing law at the time Proposition 22 was adopted already limited California marriage licenses to a man and a woman (Fam. Code § 300), the only purpose of the initiative statute was to prevent the recognition in California of same-sex “marriages” that may

pamphlet. (*Knight, supra*, 128 Cal.App.4th at 23.) However, if the language is not ambiguous, “‘not even the most reliable document of legislative history . . . may have the force of law.’ [Citation.]” (*City of Sacramento v. Public Employees' Retirement System* (1994) 22 Cal.App.4th 786, 795 [27 Cal.Rptr.2d 545].)

be allowed in another state. However, if such a narrow view of the scope of Proposition 22 is accepted, it would have to follow that the voters, while they intended to permanently prohibit the recognition of same-sex “marriages” from other states, nevertheless intended to give the Legislature authority to later amend the definition of marriage in Section 300 to permit licensing of same-sex “marriages” within California, even though such a later amendment would be in direct conflict with the plain and unqualified language of Proposition 22. It is well established that where a statutory provision is susceptible to two constructions, one of which in application will render it reasonable, fair, and in harmony with its manifest purposes, and another which would produce absurd consequences, the former construction will be adopted. (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 305 [58 Cal.Rptr.2d 855].)

Considering the ordinary meaning of the words, Proposition 22 states that only marriage between a man and a woman is valid in California, and only marriage between a man and a woman can have legal recognition in California. “Valid” and “recognized” should not be construed to mean the same thing in the statute. As this Court has held, “Courts should give meaning to every word of a statute, if possible, and should avoid a construction making any word surplusage.” (*Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 22 [56 Cal.Rptr.2d 706].) Taken together, the reference to “valid” obviously refers to marriages within the state, while the reference to “recognized” can refer to marriages from within or without the state. The marriage licenses issued to same-sex couples by the City in 2004 were certainly not valid. (*See Lockyer, supra*, 33 Cal.4th at p. 1069, 1116.) And “[s]ince the earliest days of statehood, California has *recognized* only opposite-sex marriages.” (*Id.* at p. 1128 [Kennard, J., concurring; emphasis added].)

Even if Proposition 22 could be construed as applying either to out-of-state marriages only or to both in- and out-of-state marriages, it should still be construed as applying to both. Otherwise, the initiative would preclude recognition of same-sex “marriages” from Massachusetts,¹⁷ while allowing the licensing of same-sex “marriages” in California. Such a construction would violate Article IV, Section 2 of the United States Constitution, the privileges and immunities clause. (*See Hicklin v. Orbeck* (1978) 437 U.S. 518, 523-24 [states must treat residents of other states as favorably as their own residents].) This Court has held that statutes must be construed “in a fashion that avoids rendering [their] application unconstitutional.” (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Ct.* (1999) 20 Cal.4th 1178, 1216 [86 Cal.Rptr.2d 778].) To construe Proposition 22 in a fashion that avoids rendering it unconstitutional requires applying it to California and foreign marriages. (*See Hicklin, supra*, at p. 523-24.)

CONCLUSION

For the foregoing reasons, this Court should reverse the Court of Appeal’s decision on justiciability, and rule that Proposition 22 applies to marriages contracted in California.

Dated: March 30, 2007

Respectfully submitted,

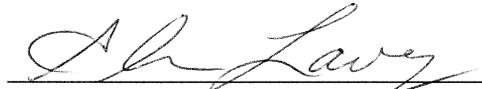
By: GLEN LAVY
Attorney for the Plaintiff-Petitioner
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¹⁷Massachusetts is the only state in the United States that issues marriage licenses to same-sex couples.

CERTIFICATE OF COMPLIANCE PURSUANT TO RULE OF COURT 14

Pursuant to California Rule of Court 14(c)(1), counsel for Plaintiff-Petitioner hereby certifies that this brief was prepared in Times New Roman 13 font, and that the number of words contained in the foregoing Plaintiff-Petitioner's Opening Brief, including footnotes, but excluding the Table of Contents, Table of Authorities, This Certificate, and any attachments, is 9,842, as calculated by using the word count feature of WordPerfect, the computer program used to prepare this brief.

Dated: March 30, 2007

A handwritten signature in cursive script, reading "Glen Lavy", written over a horizontal line.

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